



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE COMPENSATION AMENDMENT TO THE NEW YORK CONSTITUTION¹

HENRY ROGERS SEAGER

Professor of Political Economy, Columbia University; Vice-Chairman of the New York Employers' Liability and Unemployment Commission

ON March 24th the court of appeals of this state declared the Wainright Act (chapter 674 of the Laws of 1910), making the payment of compensation to the victims of industrial accidents in certain employments compulsory, unconstitutional. This act was no hasty or ill-considered piece of legislation. It was passed on the recommendation of the Commission on Employers' Liability appointed in 1909, defended in its report, of which the court of appeals itself speaks in high terms, and approved by so careful a lawyer as Governor Hughes.

The arguments urged in its support were briefly as follows: The present system of providing indemnities for the victims of industrial accidents, under which the right to indemnity or "damages" depends on ability to convict the employer of negligence, is in its practical operation inadequate, wasteful and even vicious.

Under it only a small proportion of injured wage-earners, about one in eight according to the returns of the employers' liability insurance companies, is able to obtain damages. Even these wage-earners, instead of receiving the indemnity when it is most needed, immediately after the accident, may have to await the conclusion of a long and costly law suit, which eats up a large part of the verdict that is ultimately obtained. Thus, as a means of relief from the added expenses and curtailed earnings which a serious accident entails, the law is a complete failure. Wage-earners as a whole are little better off, notwithstanding the sensationally large verdicts that are occasionally awarded, than they would be if they were without

¹ Read at the joint meeting of the Academy of Political Science and the New York Association for Labor Legislation, November 10, 1911.

this gambler's chance and were forced to bear themselves the entire loss as well as the pain and suffering which accidents cause.

Often laws which are disadvantageous to wage-earners have compensating advantages from the viewpoint of employers, but this cannot be claimed for our employers' liability law. Of the money they are forced to pay out under it, only a small part, not over one-third on the average according to the estimates of the New York commission, reaches the injured employe. Moreover, it is of no advantage to employers to be put in the position of soulless monsters turning over their employes to the mercy of heartless claim agents at the very time when they most need their sympathy and help, nor to be mulcted in heavy damages, whenever negligence can be proved against them, by incensed juries whose humanity is outraged by the constant miscarriage of justice under the system.

Nor is much that is favorable to the law to be urged from the standpoint of the lawyer or the judge. It is condemned by the best representatives of the bench and bar because it involves the legal profession in a branch of litigation in which trickery, fraud and ability to appeal to the sympathy rather than the intelligence of a jury are requisites for success, rather than mastery of legal principles or fidelity to the accepted code of legal ethics.

To society the system is entirely inadequate because it merely tinkers at rather than solves the serious problem presented by industrial accidents. Worked out by our forefathers to suit the industrial conditions that antedated the railroad and the factory, it is quite unsuited to the complex conditions of our day. Moreover, the burden of expense entailed on the state by the litigation which it fosters is another serious offset to the damages awarded to that small proportion of wage-earners who prosecute suits successfully.

The New York commission presented in its report a convincing arraignment of the present employers' liability law and few persons who have taken the trouble to study the facts will dissent from its conclusions :

First : That the present system in New York rests on a basis that is economically unwise and unfair, and that in operation it is wasteful, uncertain and productive of antagonism between workmen and employers.

Second : That it is satisfactory to none, and tolerable only to those employers and workmen who practically disregard their legal rights and obligations and fairly share the burden of accidents in industries.

Third : That the evils of the system are most marked in hazardous employments, where the trade risk is high and serious accidents are frequent.

Fourth : That as a matter of fact, workmen in the dangerous trades do not, and practically cannot, provide for themselves adequate accident insurance, and therefore, the burden of accidents falls on the workmen least able to bear it, and brings many of them and their families to want.

There are many evils which do not admit of a remedy through legislation. Is the unsatisfactory operation of our employers' liability law the consequence of insurmountable difficulties in the situation or merely proof that the law itself is based on a false theory? It is necessary only to know what other countries are doing in this field to be convinced that the trouble is with our law, not with our industries, nor with the employers and employees who operate them. Every important country in the world except the United States has given up in whole or in part the principle of employers' liability and substituted for it that of compensation. This principle is well explained by Senator Elihu Root who considers the present law "foolish, wasteful, ineffective and barbarous."

All accidents (he says) all injuries are subject to the law of average. The cost of support which is made necessary by the injuries suffered in a business is just as much a part of the cost of the business as the tools that are worn out and the material that is consumed. It ought to be paid for by the business as a part of that cost and not left to the charity of the nation at large.

Different plans are being tried for bringing about this result and opinions differ as to which of these—British compensation, German insurance through mutual employers' associations, or

Norwegian state insurance—is best adapted to American conditions. All of these systems, however, have in common the compensation principle, that is, they require employers to pay indemnities, either directly or indirectly through an insurance fund, to wage-earners injured in the course of their employment, whether or not such injury is due to the employer's negligence. Thus they must pay when the accident is due to the carelessness of a fellow-servant, to risks inherent in the industry, to contributory negligence on the part of the injured wage-earner himself, or even to such negligence without any contributory negligence on the part of the employer, unless such negligence is of so gross a character as to amount to deliberate self-injury. In other words, in all these systems, now well-nigh universal outside of the United States and rapidly spreading in the United States outside of New York, the principle of negligence with its limitations is given up and for it is substituted the principle of compensation.

The Wainwright Act, which was declared unconstitutional, was modeled after the British compensation law. It presented the compensation principle for the first time to our courts, and anxiety lest it should be deemed unconstitutional caused the commission which framed it to formulate it with more regard to legal than to economic theory. Thus it applied only to extra-hazardous employments and to accidents in such employments due to the hazard peculiar to the industry.

The constitutional argument in support of the law is quite simple. Because of the extra-hazardous character of certain industries, measures for the protection of employes engaged in such industries are justified. Thus far the legislature, in the exercise of its police power, has limited these measures to the prescription of certain safety devices. In a compensation law it goes farther, and says to the employer that he may continue to carry on such dangerous industries only on condition that he become the insurer of his employes against the risks to which their employment in his service exposes them. As such insurer he is made liable for compensation to them on a moderate scale—half wages in this law—when they are injured in consequence of the risks inherent in the employment, and he is re-

quired to indemnify their families by the payment of a reasonable sum—not exceeding \$3,000 under this law—when they are killed.

The New York court of appeals might have objected to this statute on various grounds. Thus it might have held the proposed classification of extra-hazardous employments unreasonable, or might have found fault with the method adopted of discouraging litigation and jury trials. Fortunately for the clarity of the issue which its decision presents, the court of appeals based its objections on the compensation principle itself. The following summary, taken from the *Fourth Report of the Commission on Employers' Liability*, shows how free the decision was from captious or technical objections to the law and at the same time how persuaded were the judges of our highest court—the decision was unanimous—that the compensation principle is inconsistent with the due-process clause of our constitution as they interpret it.

Imposing upon the employer liability for industrial accidents when the accident is not due directly or indirectly to his negligence, is taking his property without due process of law. The idea that the law may be justified since it merely compels the employer to assume the risks of the trade, whereas the law before compelled the employe to assume those risks and because one plan is logically as defensible as the other, is disposed of by pointing out that the employe assumes the risks not because of the law, but because of the nature of the case. He is the person injured; upon him fall the consequences of the injury. All that the law does is to say that under certain circumstances, that is, if the negligence of the employer has caused the accident without any contributory negligence on the part of the employe, he may have the right to recover. To argue that the law may now go further and say that he shall have the right to recover, even if there has been no negligence on the part of the employer, appears to the court to create a liability opposed to the whole spirit of our legal system. Such procedure is not justified, in the opinion of the court, as an exercise of the police power. That power might be urged in support of a measure designed to promote the public health, but in the view of the court the act under consideration “does nothing to conserve the health, safety, or morals of the employes, and it imposes upon the employer no new or affirmative duties or responsibilities in the conduct of his business.”

The court finds that the law is valid as regards its classification of extra-hazardous trades, nor does it disapprove of the statute on the ground that it interferes with the right of trial by jury, or that it violates section 18, article 2 of the constitution, which declares: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

The judges thus declare in the clearest terms that the compensation principle and due process of law are irreconcilable, and it cannot be claimed that they have arrived at this conclusion through failure to appreciate the force of the economic reasons that have led to the world movement to substitute the compensation principle for the employers' liability principle. They say expressly:

In arriving at this conclusion we do not overlook the cogent economic and sociological arguments which were urged in support of the statute. There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such addition to the price of his wares as to cast the burden ultimately upon the consumer: that indemnity to an injured employe should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools; that, under our present system, the loss falls immediately upon the employe, who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific, and wasteful, and fosters a spirit of antagonism between employer and employe which it is to the interests of the state to remove. We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment, but we think it is an appeal which must be made to the people and not to the courts.

Later they make their position more clear by asserting:

The right of property rests not upon philosophical or scientific speculation nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but

not by legislatures. In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided.

It is no part of the purpose of this paper to argue in regard to the soundness of this decision. It has been criticized by able lawyers and teachers of law from the Atlantic to the Pacific. Many valuable reports and briefs have been prepared attacking the narrow and unprogressive interpretation of the due-process clause on which it rests and calling attention to the much more liberal tone of the decisions of the federal Supreme Court. Finally, a similar issue has since been passed on by the supreme court of the state of Washington in connection with the compulsory accident insurance law of that state, and the judges of that court after reviewing the reasoning of our court of appeals, have unanimously decided that for that state at any rate the compensation principle, carried a good deal farther than was attempted here, is in entire harmony with the due-process requirement.¹ For advocates of compensation legislation in other jurisdictions the volume of authoritative opinion on the other side, which has been called out by the New York decision, nearly if not quite outweighs the disappointment which that decision has caused. It has educated public opinion on this whole subject as nothing else could have done. It has stimulated the ingenuity of legislators to secure the benefits of a compulsory compensation law while appearing to confine their enactments within voluntary contractual lines. Finally, it has caused the constitutional argument for the compensation principle to be summed up with such convincing force as, for example, in the memorandum prepared by the law committee of the Civic Federation headed by Francis Lynde Stetson, in the brief submitted for the state in the Washington case, and in the Washington decision itself, that it can now scarcely be doubted that the United States Supreme Court, when called upon to decide whether this new method of dealing with industrial accidents conflicts with federal due process of law, will again give proof of its progressive and enlightened attitude.

¹ State of Washington *v.* Clausen, decided September 27, 1911.

In this state, however, it is a condition and not a theory which confronts us. Our court of last resort, interpreting a clause in the state constitution, has said unanimously that the compensation principle is at variance with our fundamental law and has declared that if we wish to introduce it into our system of jurisprudence, unless by some unsatisfactory side-door method like that adopted by our sister state of New Jersey, we must make our appeal not to the court, but to the people, in whose hands rests the amendment of the fundamental law.

To the members of the New York Association for Labor Legislation and through them to the legislators and citizens of this state I wish to address such an appeal. The argument for the compensation principle, as a substitute for or supplement to the principle of employers' liability, seems to me conclusive. It has carried the day in every important country except the United States. Its beneficent results are attested by both employers and employes in every country in which it has been introduced. To secure the application of this principle to industrial accidents in New York we must either evade this decision by imposing on employers and employes burdens which will lead them to choose this system voluntarily; get a different ruling from the same court on another statute which presents the principle in slightly different form; or *amend the constitution*.

I oppose the first plan, except as a last resort, because I believe the compensation principle to be just and right, and I am not willing to accept the view that it does not harmonize with our fundamental law. It is more important, in my opinion, to keep our fundamental law abreast of our conceptions of justice and truth than even to do away with our present "foolish, wasteful, ineffective and barbarous" system of employers' liability. Moreover, I question whether the full advantages of a compensation system can be secured through free contract, that is, without making its acceptance obligatory on all employers and employes alike.

The second plan seems to me even more objectionable. That the court of appeals will reverse itself on this issue in any reasonable time is a vain hope. It has declared itself and declared itself unanimously. It is true that thirty years hence,

when the compensation principle is in general operation in other jurisdictions, the new judges who will then compose our court of appeals would probably reverse this decision. Believing in the soundness, legally and economically, of the compensation principle, I cannot doubt this. But who of us is willing to wait thirty years for a reform that is already shamefully overdue?

It has been suggested that our judges might be led to reverse themselves even in our generation if we could get a case, under the Wainwright or some other law, before the federal Supreme Court and there obtain a favorable decision. Those who entertain this hope should consider two facts. First, in its decision the court of appeals clearly anticipated the possibility that the Supreme Court of the United States might hold such a law in harmony with federal due process, and yet declared it inconsistent with due process in this state. On this point it said, referring to the language used in recent federal decisions:

As to the cases of *Noble State Bank v. Haskell* (219 U. S. 104) and *Assaria State Bank v. Dolley* (219 U. S. 121) we have only to say that if they go so far as to hold that any law, whatever its effect, may be upheld because by the "prevailing morality" or the "strong and preponderant opinion" it is deemed "to be greatly and immediately necessary to the public welfare," we cannot recognize them as controlling our construction of our own constitution.

Second, there is no reason to suppose, even could a case involving a citizen of another state be commenced in the federal courts, that these courts would give it serious consideration. They would almost certainly content themselves with pointing out that the act in question had been declared to be in conflict with the state constitution and is therefore null and void whatever view they may take of its relation to the federal constitution.

We are thus confronted, it seems to me, with the clear and manifest duty of amending the state constitution.

Three amendments were proposed at the last session of the legislature and one of these, the Jackson amendment, passed the assembly. This goes farther than would be necessary to

cause due process to be interpreted as not condemning the compensation principle. It reads:

Nor shall anything in this constitution contained prevent the legislature from making such provision as to it may seem proper for the security and protection of the lives, health and safety of workmen, for compensation for injuries to them caused by accidents, or otherwise, arising out of their employment, for insurance against accidents, sickness, invalidity and old age, and for the good and welfare of the state and the people of the state.

In appealing to you this afternoon to work for a compensation amendment, I do not wish to urge the particular language of this or any other proposed new clause. There is time before the convening of the legislature to give further thought to this important matter and to agree on the phrasing of an amendment that will be generally satisfactory. I do believe, however, that it is important that we should take advantage of the situation which this illiberal decision of the court of appeals has created, to have embodied in the constitution a clause giving wider scope to the police power in connection with all kinds of protective labor legislation. As time goes on, the New York Association for Labor Legislation will certainly desire to support other enlightened legislation such as is in successful operation in other countries. Just what forms this legislation should take cannot be decided in advance, but is it not clear that as problems arise calling for new regulations these should be shaped by reference to economic and sociological considerations rather than by reference to some theory as to what constitutes due process of law, which, however well suited to conditions when our constitution was adopted, is quite out of relation to modern industrial needs?

The objection that will be urged against this view is, of course, that in opening the way for wise and much-needed labor regulations, we may at the same time remove the constitutional restraint on arbitrary, unreasonable and socially objectionable uses of the legislative power fathered by demagogues and enacted to secure the political support of some favored class.

The conclusive reply to this objection is that in liberalizing

our state constitution we do not relax in the least the restraints imposed by the due-process clause of the federal constitution as interpreted by the federal Supreme Court. That tribunal has never evinced any very radical or revolutionary tendencies. It is fully alive to the rights of individuals and fully competent to prevent legislatures from encroaching on them in ways that are unreasonable or unwarranted by serious economic or social evils. On the other hand the judgments of the Supreme Court are, taken as a whole, more enlightened and more socially reasonable than those of any state court. Made up, as it should be, of jurists who have attained distinction through their unusual capacities, it can more safely than state courts be entrusted with the delicate task of interpreting our written constitutions so as to guide and yet not to hamper our national progress. So long as we have the due-process clause of the federal constitution and the federal Supreme Court to interpret it, I submit that there is no valid objection to giving the broadest definition to the police power in our state constitution.

One very important consequence of such a procedure would be to promote that uniformity of state legislation that is so much to be desired. Under such a plan the constitutional restriction on labor legislation would be applied by one tribunal, and that the ablest and wisest tribunal which the country possesses. Labor regulations would, if this plan were generally adopted, be either unconstitutional for the whole United States or constitutional for the whole United States. No change would be more certain to facilitate the enactment of wise labor laws or to remove the impression, now unfortunately widespread among wage-earners, that the courts are hostile to their interests.

Your executive committee is so impressed by the force of these considerations that at a recent meeting it voted to endorse provisionally the Jackson amendment as the one most likely to pass. It is probable that a better amendment can be drafted and that by earnest effort in the next two months all of the organizations that should support it may be marshaled behind it. What is important this afternoon is that all our members resolve to work together for a compensation amendment and direct their executive committee to decide between the

different amendments that may be presented and to take the necessary steps to secure the enactment of the one preferred by the legislatures of 1912 and 1913 and its submission to the people in November 1913, as required by the constitution.

We believe such an amendment to be necessary. We believe that it will effectively clear the way for wise compensation legislation, because we think that the compensation principle will be upheld by the Supreme Court of the United States as in harmony with the federal constitution. Finally, we approve an amendment that will widen materially the scope of the state's police power, because we believe only good will come from giving to the state legislature in the field of protective labor laws a freer hand so far as the limitations of our state constitution are concerned.